No. 78-270

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY

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PETITIONER'S REPLY

The Federal Communications Commission, in response to oppositions filed by MCI Telecommunications Corp. and Southern Pacific Communications Co., respectfully submits this reply in support of its petition for a writ of certiorari.[1] The Commission's petition rests on (1) a direct and irreconcilable conflict between the decision below (Pet. App. 1A-24A) and an earlier decision of the Third Circuit construing the

[1] Companion petitions were filed by the United States Independent Telephone Ass'n (No. 78-216) and the American Telephone & Telegraph Co. (No. 78-217).

same FCC interconnection orders (Pet. 22-26);[2] (2) the court of appeals' improper expansion of its previous mandate[3] to govern matters that court had not considered or decided in the earlier case (Pet. 27-29); (3) judicial intrusion into the administrative process, by making and implementing substantive communications policy (Pet. 29-32); and (4) error in statutory interpretation and construction of fundamental communications policy decisions of the FCC (Pet. 32-36).[4]

The oppositions have not refuted our arguments in support of certiorari. In this brief reply, we address several basic failings in the oppositions which reflect similar failings in the decision of the court of appeals.

1. Intrusion into Administrative Process.

The court of appeals plainly has performed an administrative function by directly requiring interconnection to implement "the intended effect" of its own earlier policy decision in *Execunet I*.[5] The oppo-

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[2] *Bell Telephone Co. of Penn.* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975). The Third Circuit's opinion is reproduced in the Appendix to AT&T's petition in No. 78-217, pp. 1g-63g.

[3] *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (Pet. App. 1B-33B).

[4] The opinion of the court of appeals now has been reported at 580 F.2d 590.

[5] See Pet. App. 18A, where the court of appeals stated that the FCC's declaratory order on interconnection "deliberately frustrates the purpose of the litigation, the basis on which it was presented by the parties, and the intended effect of our decree."

sitions of MCI and Southern Pacific, although denying in abstract terms that this is the case,[6] do not contend that the court of appeals merely remanded the matter to the FCC for correction of legal error. Indeed, they could not make such an argument, as an examination of the proceedings below shows.

MCI phrased its request for relief in *Execunet II* as follows:

> It is requested that the Federal Communications Commission be ordered to direct the American Telephone and Telegraph Company (AT&T) and its local operating companies (Bell Companies) to continue to provide the local interconnections required by MCI to provide, over its existing facilities, Execunet service and all of its other authorized services. It is further requested that the Court rule * * * that AT&T and the Bell companies must provide such interconnections.

MCI's Motion for an Order Directing Compliance with Mandate, pp. 1-2.[7] The court of appeals granted the motion without any indication that it was ordering anything less than or different from the relief MCI had requested. App. 1A-2A, 4A-5A, 24A. Nor did anything in the order or the attached opinion purport to remand the matter to the FCC for correction of legal error. Instead, the court of appeals directly performed the administrative act of requir-

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[6] MCI Opposition 25-27; Southern Pacific Opposition 15, 19-20.

[7] See also, *id.*, p. 8; MCI's Reply to Oppositions (to its motion for an order directing compliance with mandate), pp. 50-51.

ing interconnection[8] to effectuate MCI's judicially created "right to enter the [long distance telephone service] market now." Pet. App. 10E. This Court should grant certiorari to restore the appellate process to its proper and lawful bounds. See Pet. 29-32.

2. Expansion of Mandate

The oppositions argue, in effect, that the court of appeals did not improperly expand its mandate in *Execunet II*, because its interconnection order was essential to implement the "intended effect" of the earlier decree.[9] The fundamental flaw in this reasoning is that the court of appeals simply may not have an "intended effect" other than the correction of error it has perceived and identified in review proceedings. As we pointed out in our petition—and, indeed, as the court of appeals itself was at pains to state in *Execunet I*, and as MCI and Southern Pacific assured this Court in their oppositions to certiorari in that earlier stage of proceedings—the Commission was reversed in *Execunet I* on the sole ground that the agency had not "properly exercised" its authority under Section 214(c) to restrict MCI's use of its own facilities to private line services. Pet. App. 22B-

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[8] Section 201(a) gives the FCC the authority to require carrier interconnection after opportunity for hearing and on the basis of an affirmative public interest finding. 47 U.S.C. § 201(a). The FCC believes that it has had no hearing and made no finding that would justify an order of interconnection for ordinary long distance telephone service. Pet. App. 36C-44C.

[9] MCI Opposition 15-18; Southern Pacific Opposition 12-16.

31B. The mandate arising from such a decision—as any other judicial mandate—can govern only those matters the court considered and decided directly. See Pet. 27-29, and cases cited.

The oppositions also parrot a distortion of the earlier *Execunet I* holding by which the court of appeals tried to justify its interconnection order as a mere enforcement of mandate. The Commission had taken the position in its declaratory ruling that interconnection for MTS, WATS and similar services (such as Execunet) was not encompassed in its prior Section 201(a) orders because those services had been "excluded from both the considerations and holdings" of the proceedings that led to the orders. Pet. App. 39C-40C. The court of appeals rejected that reasoning, stating:

> [The Commission] formulates the final and dispositive question for resolution as that of "what services were explicitly *excluded* from consideration in *Specialized Common Carrier*, *Bell System Tariff Offerings*, and *Bell Tel. Co. of Pennsylvania*." * * * And that is precisely the question we addressed and answered in *Execunet*, finding that Execunet services were *not* explicitly excluded.

Pet. App. 23A-24A, 5E. See MCI Opposition 16-17; Southern Pacific Opposition 14.

But the court of appeals in *Execunet I* answered no such question. In fact, it assumed, for the sake of argument, that the FCC had *not* considered services like Execunet in its policy-making proceedings. Pet.

App. 27B, 30B, 32B. On that assumption, the court stated:

> Nonetheless, it is readily apparent that *failure to consider* the public interest ramifications of a service—either pro or con—during resolution of a Section 214(a) application is simply not the same thing as an affirmative determination that the "public convenience and necessity may require" a restriction on a facility authorization limiting a carrier to provision solely of these services proposed in its Section 214(a) application.

Pet. App. 27B-28B (emphasis added). Thus, the court of appeals found in *Execunet I* that exclusion of certain services from consideration was not a sufficient basis for inferring that those services were forbidden.[10] The court plainly did *not* find "that Execunet services were *not* explicitly excluded." Pet. App. 24A. The court's gross distortion now of its own earlier opinion is justification alone for this Court to grant certiorari and properly construe the *Execunet I* mandate on the basis of matters actually considered and decided.

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[10] The FCC's analysis of the Section 201(a) interconnection question is entirely consistent with the court of appeals' reasoning in *Execunet I*. Because Section 201(a) requires an affirmative determination that MTS/WATS interconnection is "necessary or desirable in the public interest," a failure to consider those services (*i.e.*, exclusion of those services from the scope of the inquiry in the *Specialized Common Carrier Services* proceeding) is not sufficient to create the interconnection obligation in question. Pet. App. 28C-43C, 55C-57C; Pet. 14-19.

3. Error in Statutory Construction.

MCI and Southern Pacific evade any direct response to our assertion that the FCC has never provided the requisite opportunity for hearing or made the requisite public interest finding to support an unbounded interconnection order. Instead, the argument appears to be merely that the "expansive interpretation" the court of appeals gave to MCI's facilities authorizations under Section 214 "mandates an equally expansive view of the scope of the interconnection obligations of AT&T * * *." MCI Opposition 23-24; Southern Pacific Opposition 10, 14, 18; Pet. App. 17A.

But interconnection rights and obligations under Section 201(a) are not mere corollaries to facilities authorization under Section 214.[11] Pet. 15-16, 32-36.

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[11] The history of MCI's entry into the communications business bears witness to the distinction between the right to erect and operate one's own facilities and the right to interconnect those facilities with other carriers. In *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), 21 FCC 2d 190 (1970), the FCC granted MCI its first authorizations to erect facilities to offer private line services; but it expressly reserved jurisdiction to resolve the separate question of interconnection. 18 FCC 2d at 965. On reconsideration, the FCC rejected claims that its Section 214 grants had prejudged the Section 201(a) question, pointing out that it had not ordered interconnection but had "retained jurisdiction" to resolve that matter if MCI should present a "particular application." 21 FCC 2d at 193. See also *Specialized Common Services*, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm.* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), where the FCC posed and resolved separate issues as to facilities authorization, on the one hand, and interconnection on the other, in-

Congress provided a separate statutory provision to govern interconnection, expressly requiring an "opportunity for hearing" and affirmative public interest findings before the agency may order unwilling carriers to make their facilities available to other carriers.[12] The court's interconnection order disregards the crucial hearing and public interest findings that Section 201(a) requires, and thus misconstrues and misapplies the relevant statute.

Southern Pacific "responds" to one argument that the petitioners did *not* make: that the statute requires an "evidentiary" hearing. Southern Pacific Opposition 18. See also MCI Opposition 23. The FCC acknowledges—indeed, it argued the point successfully in the Third Circuit[13]—that its notice and comment rulemaking in *Specialized Common Carrier*

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voking *both* Section 214 *and* Section 201(a) as statutory authority for its actions. 29 FCC 2d at 878. See also 24 FCC 2d 318, 327, 349 (1970) (Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order).

[12] The court's assertion that the FCC did not rest its declaratory ruling on *current* public interest findings is wholly beside the point. Pet. App. 9E-10E; Southern Pacific Opposition 15. The FCC was disposing of a request for clarification of *existing* interconnection obligations under *prior* orders. Surely the proper inquiry for the agency was *not* "what clarification of those prior orders would best serve the public interest," but rather "what do those orders mean." The FCC may consider further interconnection in further proceedings which give proper notice and afford an opportunity for meaningful participation. But the FCC may not revise history and distort its own past orders on the basis of current notions of the public interest.

[13] *Bell Telephone Co. of Penn.* v. *FCC*, 503 F.2d at 1259-68.

Services [14] satisfied the hearing requirement of Section 201(a) insofar as that proceeding ordered private line services interconnection. Our hearing argument in this case is that *Specialized Common Carrier Services* could not justify an interconnection order embracing services that were not considered. It is no answer to that argument to assert merely that the denial of interconnection "frustrates the purpose" of MCI's litigation and the "intended effect" of the court's decree. Pet. App. 18A. Neither the court of appeals nor the parties opposing our petition can claim that the FCC gave notice of or an opportunity to comment on interconnection for MTS, WATS and similar services. Our contention thus remains unrefuted.

4. Conflict with the Third Circuit.

MCI and Southern Pacific, like the court of appeals, lose sight entirely of the issues the Third Circuit decided, in their efforts to reconcile *Bell of Pennsylvania* [15] with *Execunet II*. Pet. App. 18A-24A, 6E-9E; MCI Opposition 18-21; Southern Pacific Opposition 16-19. The Third Circuit necessarily considered and ruled on the scope of AT&T's interconnection obligation under the same orders the D.C. Circuit considered in *Execunet II*. Pet. 22-26. The Third Circuit expressly found and held that the FCC had limited the obligation to private line services, 503

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[14] *Supra*, 29 FCC 2d 870, 31 FCC 2d 1106.

[15] *Supra*, 503 F.2d 1250.

F.2d at 1262, 1270-74; the D.C. Circuit, finding that the interconnection obligation was "equally expansive" with MCI's unlimited service authorizations, held in effect that there was no limitation at all on AT&T's obligation and MCI's rights, Pet. App. 13A-18A, 23A-24A, 9E-11E. The conflict could hardly be more direct and irreconcilable.[16]

The conflict also pervades the reasoning behind the disparate opinions. The D.C. Circuit disregarded the fact that the Third Circuit analyzed the interconnection orders in depth to determine (1) whether the FCC had satisfied Section 201(a); (2) what the FCC had considered in its inquiry; (3) the adequacy of notice and of hearing opportunities; and (4) whether the orders were fatally vague or overbroad. In each aspect of its analysis, the Third Circuit came back to and relied upon the central fact that the FCC was ordering interconnection only for private line services. 503 F.2d at 1259-74. This was crucial to its

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[16] AT&T's argument that the Third Circuit has exclusive jurisdiction to construe the FCC's interconnection order has practical as well as legal force. See AT&T Pet. 17-22; Pet. 33 n.38. If the D.C. Circuit had deferred to that court as the proper forum to review the FCC's declaratory ruling, there would be no question of conflict between the circuits and no cause to invoke this Court's jurisdiction on that ground. While conflicts may not always be avoided, this one plainly was not necessary. The D.C. Circuit was well aware of the Third Circuit's prior decision and of the petitioners' position that the Third Circuit's decision was controlling. The D.C. Circuit's insistence on granting MCI's motion demonstrates the court's preoccupation with its own policy determination in *Execunet I* and its zeal to implement that policy. *Cf. Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

resolution of arguments about the adequacy of notice and hearing, claims that the order was vague and overbroad,[17] and allegations that the FCC was unlawfully expanding its own policy to encompass services that its rulemaking proceeding had not contemplated. *Id.* See Pet. 22-26.

The D.C. Circuit, in contrast, virtually ignored the requirements of Section 201(a) and the problems of overbreadth, notice and hearing that had been the focus in the Third Circuit. Instead, it considered the motion in terms of consistency with the "basic themes" of *Execunet I*,[18] its own (unexpressed) contemplation in the earlier case that interconnection was required,[19] its notion of what would be "strikingly

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[17] The parties supporting the FCC's orders in the Third Circuit—including MCI, Southern Pacific and the Department of Justice through its Antitrust Division—assured the court that the orders extended only to private line services. Pet. App. 32C-33C, 37C. The court's reliance on those assurances is evident in its opinion. See Pet. n.28 at 24-25. MCI made similar representations to this Court—as did the FCC and the Department of Justice—in opposing a petition for certiorari to the Third Circuit. *AT&T* v. *FCC*, No. 74-1229, 422 U.S. 1026. MCI's condemnation now of "dissimulation" and "holding back of arguments," MCI Opposition 14, invites critical comparison of its own positions now with those it took before the FCC and the courts in earlier stages of specialized common carrier development. Pet. App. 32C-33C, 37C; Pet. n.20 at 16-17. See also MCI's oppositions to certiorari in *AT&T* v. *FCC*, No. 74-1229, *supra*, and *National Ass'n of Reg. Util. Commissioners* v. *FCC*, No. 74-1550, 423 U.S. 836.

[18] Pet. App. 17A.

[19] Pet. App. 12A, 17A.

unfair" to MCI,[20] and concern for the "intended effect of [its] decree." [21]

The D.C. Circuit thus posed a simple syllogism to resolve the interconnection question:

1. The FCC in *Specialized Common Carrier Services, supra,* and *Bell System Tariff Offerings* [22] ordered AT&T to interconnect with the specialized carriers for all their authorized services;

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[20] Pet. App. 12A.

[21] Pet. App. 18A. The D.C. Circuit also discussed "representations and actions" by AT&T in the earlier case which the court regarded as concession of the interconnection issue. Pet. App. 12A-13A. Although the court did not rest its decision in *Execunet II* on estoppel, Pet. App. 13A, the oppositions make much of this point, MCI Opposition 15-16; Southern Pacific Opposition 12-13. But there can be no estoppel here. See Pet. n.32 at 27-28. When the court of appeals reversed the Commission in *Execunet I* on grounds that MCI's certificates were not limited, the Commission was entirely free on remand to take into account issues and factors that the court had not foreclosed in its decision. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 200-01 (1947); *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). There can be no legitimate claim that the FCC has resorted to "piecemeal" litigation, holding the interconnection point in reserve. There simply was no reason for the FCC to consider alternative grounds for rejecting MCI's Execunet offering, because there had been no suggestion before *Execunet I* that MCI had authority beyond private line services. As a procedural matter, of course, FCC counsel could not have raised the interconnection question in the courts because it had not been the basis for the agency's decision. See *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

[22] 46 FCC 2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Penn.* v. *FCC, supra,* 503 F.2d 1250.

2. *Execunet I* established that MCI, a specialized carrier, was authorized to offer Execunet (as well as any other service its facilities were capable of providing); and

3. Therefore, AT&T has been ordered to interconnect with MCI for purposes of offering Execunet (as well as any other service MCI's facilities are capable of providing). Pet. App. 13A-18A.

The court's attempt to reconcile its decision with the Third Circuit's [23] is not responsive to our claim of conflict.[24] The Third Circuit *had* to determine the reach of the interconnection requirement. It found that FX and CCSA were within that reach *because* they were private line services. Moreover, that court found that the interconnection orders were not overbroad *because* they were limited, when read in context, to private line services. The entire theory of that case, as well as its express holdings on issues that AT&T raised directly, requires the conclusion that the Third Circuit held the interconnection orders to be limited to private line services.

The D.C. Circuit and the oppositions would have this Court disregard the essential analysis and holdings of *Bell Telephone Co. of Penn.* and to entertain the fiction that no conflict exists. But the D.C. Cir-

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[23] "[J]ust as the Third Circuit found *Specialized Carrier* sufficiently broad to include FX and CCSA service, notwithstanding the absence of specific references to those services, so too we have found that decision broad enough to encompass Execunet, notwithstanding the similar absence of specific references." Pet. App. 21A; 7E-8E.

[24] Pet. 22-26.

cuit could not amend or erase the Third Circuit's decision by means of a subsequent decision resolving a "very different issue." Pet. App. 27B n.59. This Court should grant the petition to resolve the conflicting mandates, so that the Commission will know which to obey.

5. Ripeness and Timeliness.

The oppositions appear to argue that the petitions come both too early and too late.[25] They are too early, it is claimed, because the court of appeals really has not done anything yet; and they are too late because this Court denied certiorari in *Execunet I*.

Review now surely would not be premature. The D.C. Circuit already has adopted and implemented communications policy in derogation of the FCC's responsibility. It has improperly ordered interconnection in violation of the applicable statute. It has expanded its prior mandate to cover matters it had not considered and decided before. It has ruled in direct and irreconcilable conflict with the Third Circuit. There is no reason for this Court to wait further.[26]

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[25] *Compare* MCI Opposition 14, 18 and Southern Pacific Opposition 14-15, *with* MCI Opposition 25-27 and Southern Pacific Opposition 19-21.

[26] The Commission's ongoing inquiry into MTS/WATS competition, *MTS and WATS Market Structure* (CC Docket No. 78-72), 67 FCC 2d 757 (1978), cannot correct the serious judicial errors the D.C. Circuit has committed. While that proceeding will consider interconnection questions in the context of broad agency policy, it cannot restore the proper roles of agency and court that *Execunet II* has grossly distorted.

The argument of prematurity, moreover, sounds now like a cry of "wolf" in the light of similar arguments opposing certiorari in *Execunet I*. See Pet. 13. MCI and Southern Pacific may not evade review in this Court by denying breadth in the orders below, while the court of appeals purports to enforce those orders according to their most "expansive interpretation." [27]

As for lateness, we have made clear that our petition seeks review of *Execunet II*. *E.g.*, Pet. 8 n.3. Our petition assumes that *Execunet I* is now binding on the Commission. *Id.* We do not dismiss the possibility that the Court, upon granting our petition, will look to the underlying decision as well.[28] But our petition looks to *Execunet II* only and plainly is timely filed. Pet. 2.

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[27] *Compare* Pet. App. 32B-33B *with id.* 17A-18A and 10E.

[28] By adopting the device of an order enforcing the *Execunet I* mandate and interpreting that mandate expansively to govern matters not previously considered and decided, the D.C. Circuit itself may have opened the earlier decision to review. *Cf. Federal Trade Comm'n* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-84 (1965), and cases cited at 379.

CONCLUSION

The Court should grant the petition.

Respectfuly submitted,

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